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9 **UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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12 LAURACK D. BRAY,
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14 Petitioner,

15 v.

16 STATE OF CALIFORNIA, et. al.,
17 Respondent.
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Case No. CV 22-2762-SSS (AS)

**ORDER ACCEPTING FINDINGS,
CONCLUSIONS AND
RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE**

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22 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of
23 the records herein and the attached Report and Recommendation of United
24 States Magistrate Judge.

25 Petitioner, a misdemeanor convicted in California state court, filed the
26 instant habeas petition (the “Petition”) pursuant to 28 U.S.C. § 2254. [Dkt. 1 at
27 6, 8-9, 11]. Respondents filed a motion to dismiss, arguing in part that
28 Petitioner’s petition should be dismissed for failure to exhaust his claims in state

1 court. [Dkt. 12]. In her Report and Recommendation, the Magistrate
2 recommended granting Respondent's motion to dismiss. [Dkt. 30]. Petitioner
3 now objects to the Magistrate's Report and Recommendation on both
4 procedural and substantive grounds.

5 As an initial matter, the Court rejects Petitioner's procedural arguments
6 concerning (1) Respondent's failure to comply with Local Rule 7-4 [Dkt. 34 at
7 2, 3] and (2) Petitioner's assertion that the Magistrate improperly "suggested
8 and taught litigation strategy to Respondent's counsel" [Dkt. 34 at 3, 4] for the
9 reasons already provided in the Report and Recommendation. [See Dkt. 33 at 5,
10 6].

11 Next, Petitioner contends that the Magistrate erred in concluding that
12 some or all of the claims raised in his petition had not been exhausted. Under
13 28 U.S.C. § 2554(b)(1)(A), a habeas petitioner must exhaust his state court
14 remedies before a federal court may consider granting habeas corpus relief.
15 *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). In order to satisfy this
16 exhaustion requirement, a habeas petitioner must "fairly present" each of his
17 federal claims to the highest state court with jurisdiction to consider them.
18 *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam). He may make this
19 presentation either by direct appeal or state habeas petition.

20 A misdemeanor seeking to exhaust his claims via direct review must first
21 appeal his Superior Court conviction to the corresponding appellate division. If
22 the appellate division affirms, the misdemeanor must then request that his case
23 be certified for transfer to the California Court of Appeal. If the appellate
24 division grants certification but the Court of Appeal denies the transfer, the
25 misdemeanor's claims are deemed exhausted. *McGonagle v. Meyer*, 802 F.3d
26 1093, 1096 (9th Cir. 2015) (en banc). If the appellate division denies
27 certification, the misdemeanor must instead petition the Court of Appeal
28

1 directly. His claims are exhausted once the Court of Appeal denies his petition.
2 *Id.*

3 Here, after Petitioner's misdemeanor conviction in Los Angeles County
4 Superior Court, he appealed to the proper appellate division. But once the
5 appellate division affirmed his conviction, Petitioner neither requested
6 certification of his appeal nor filed a direct petition. Petitioner therefore failed
7 to pursue direct review to the extent required for exhaustion. *See Nilsen v. Lake*
8 *Cnty. Superior Ct., App. Dep't*, No. 93-15760, 2020 WL 4701094 at *2 (N.D.
9 Cal. Aug. 13, 2020).

10 Alternatively, to exhaust his claims via state court habeas review, a
11 petitioner must present each in a context which allows the court to reach the
12 merits. *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). Before filing the
13 instant Petition, Petitioner filed two habeas petitions with the California
14 Supreme Court. The first was rejected as untimely and so does not constitute a
15 decision on the merits sufficient to exhaust. *See Davis v. Adams*, No. 93-15760,
16 2010 WL 1408290 at *2 (C.D. Cal. Mar. 3, 2010). Petitioner's second habeas
17 petition was accepted for filing but addressed only a subset of the federal
18 constitutional issues Petitioner now raises before this Court. As such,
19 Petitioner's entire Petition is subject to dismissal as "mixed" (containing both
20 exhausted and unexhausted claims). *See Rose v. Lundy*, 455 U.S. 509, 522
21 (1982).

22 In light of the *de novo* evaluation set forth above, the Court concurs with
23 and accepts the findings and conclusions of the Magistrate Judge.

24 **IT IS ORDERED** that Judgment be entered denying the Petition and
25 dismissing this action without prejudice.

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1 **IT IS FURTHER ORDERED** that the Clerk serve copies of this Order,
2 the Magistrate Judge's Report and Recommendation and the Judgment herein on
3 counsel for Petitioner and counsel for Respondent.

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6 Dated: February 8, 2023



SUNSHINE S. SYKES
United States District Judge